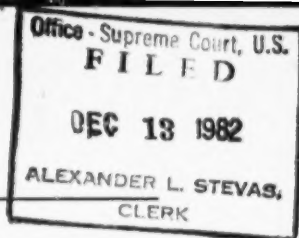


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No. -

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1982.

DANIEL SULLIVAN,
PETITIONER,

v.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY OF
D.C. SULLIVAN & CO., INC.,
RESPONDENT.

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit.**

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Questions Presented for Review.

1. Does Article III of the United States Constitution permit the pending of parties over whom there exists no independent basis for exercising jurisdiction?

2. Did Congress in enacting the Bankruptcy Act and the Bankruptcy Code intend to preclude federal courts from exercising jurisdiction over state created breach of fiduciary duty claims?

3. Whether district courts are precluded from assuming jurisdiction over parties pended to federal question claims absent interpretation of Article III and statute under which federal question jurisdiction arises.

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The petitioner, Daniel Sullivan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 19, 1982.

Opinions Below.

The opinion of the Court of Appeals is reported at 685 F.2d 729 (1st Cir. 1982). Relevant excerpts are appended. The full opinion is reproduced in the petition for certiorari filed by co-defendants.

Jurisdiction.

Denial of petition for rehearing by the Court of Appeals for the First Circuit was entered on September 14, 1982. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

The Bankruptcy Act, 11 U.S.C. § 107d(2)(a) (repealed 1978); 11 U.S.C. § 107d(2)(d); and 28 U.S.C. § 1331.

Statement of the Case.

This was an action by the trustee in bankruptcy of D.C. Sullivan & Co., Inc. against the defendants, Christopher Recklitis, Watts Detective Agency, Consolidated Service Corporation, Billy R. Otte, and Daniel Sullivan to avoid and recover an alleged fraudulent transfer of assets and for damages for unlawful diversion of corporate assets in breach of the defendants' fiduciary duty towards the company. Count One of the plaintiff's complaint was brought pursuant to the Bankruptcy

Act, § 67d(2)(a) (formerly 11 U.S.C. § 107d(2)(a)) (the Bankruptcy Code contains a similar provision 11 U.S.C. § 548 (1979)) and alleges that within the year, prior to the filing of the bankruptcy petition and while the Sullivan Company was insolvent, the defendants transferred assets of the debtor to Watts for less than fair consideration. Count Two, brought under § 67d(2)(d), also alleged fraudulent transfer, but added the element that the defendants actually intended to hinder, delay or defraud either existing or future creditors. Count Three, a pendent state claim, alleged that the defendants transferred assets of the Sullivan Company in violation of their fiduciary duty to the corporation. The defendants never alleged that defendant Sullivan received any transferred assets.

The defendants each duly filed answers. After several years in which extensive discovery was obtained, the court issued a pre-trial order, setting forth the admitted facts, disputed facts, issues of fact and issues of law. Review of the pre-trial order demonstrates conclusively that there was no allegation that Sullivan received transferred assets (pp. 12a-13a, *infra*).¹ The defendants' motions for summary judgment were denied. The trial was held from March 11, 1980 until March 17, 1980. Prior to the jury's verdict, the defendant, Daniel Sullivan, moved for a directed verdict, which motion the court denied. The jury entered judgment in favor of the plaintiff against all defendants on Count One, in favor of the defendants on Count Two and on Count Three in favor of the plaintiff as against Daniel Sullivan and Billy R. Otte. On March 20, 1980, the court entered judgment.

Each defendant filed various post-trial motions. The defendant, Daniel Sullivan, filed a motion for judgment notwithstanding the verdict and a motion for a new trial, which were denied by the court on August 28, 1981.

¹ References to the appendix are to the selected portions reproduced at the end of this brief.

The defendant Sullivan appealed from the denial of his motion for a directed verdict, from the judgment entered in the jury verdict and from the denial of his motion for a new trial and from judgment notwithstanding the verdict.

The United States Court of Appeals reversed the decision of the United States District Court of Massachusetts in so far as the district court decision imposed liability under Count One of the plaintiff's complaint, which count had been predicated upon an alleged violation of the Federal Bankruptcy Act by defendant Sullivan. In addition, the United States Court of Appeals affirmed the decision of the United States District Court imposing liability on D.C. Sullivan for breaching a Massachusetts created fiduciary duty to D.C. Sullivan & Co., Inc.

Daniel Sullivan petitioned the United States Court of Appeals for rehearing, setting forth as grounds (1) that the district court lacked jurisdiction to entertain state law claims against the appellant, and (2) that reconsideration and reversal were warranted as the jury determination had been based on irrelevant "director mistakes," tenuous "abandonment" offerings, confusing jury instructions and an absence of damages evidence.

On September 14, 1982, the United States Court of Appeals denied the plaintiff's petition for rehearing. The Appeals Court stated: "The facts as to whether Sullivan or Otte received any of the transferred property could not be determined until after trial." (See order denying rehearing (pp. 10a-11a, *infra*).) In fact, however, as the record makes indisputably clear (see pre-trial order (pp. 12a-13a, *infra*)) it was known and understood by all parties at all times that defendant Sullivan never received any transferred assets. Moreover, it was known and understood that receipt of property by Sullivan would not be an issue at trial.

Reasons for the Writ.

I. THE COURT BELOW ERRED FUNDAMENTALLY BY FAILING TO UNDERTAKE REQUIRED ANALYSIS INVOLVING CONGRESSIONAL INTENTION IN BANKRUPTCY STATUTES AND THE LIMITS OF ARTICLE III JURISDICTION.

The issue presented for the Court is whether, *absent analysis and opinion*, a federal court can expand the concept of pendent jurisdiction by enabling a plaintiff to *pend both* parties and state law claims to Bankruptcy Act claims brought against a co-defendant. In this case, the plaintiff alleged that defendants Sullivan, Otte and Recklitis violated §§ 67d and 67e of the Bankruptcy Act and that they breached their state law duties to D.C. Sullivan & Co., Inc. The United States Court of Appeals reversed the finding of the jury that Sullivan and Otte had violated 67d and 67e. In reversing, the court indicated that since 1967 it has been an "open and shut question of law" that actions under 67d and 67e cannot be sustained against a defendant unless that person has been the recipient of fraudulently transferred property (pp. 2a-4a, *infra*).

Notwithstanding its conclusion that plaintiff's 67d and 67e contentions were facially defective, the court, in denying plaintiff's petition for rehearing, held that jurisdiction existed to hear the state law breach of fiduciary duty claims. In so holding, the court, without the benefit of analysis or argument by either the district court or the Court of Appeals endorsed an expansion of pendent jurisdiction that enabled the plaintiff to pend defendant Sullivan and the state law breach of fiduciary duty claims to the 67d and 67e claims brought against the co-defendants Watts Detective Agency and James Recklitis. In its denial of petition for rehearing, the Court of Appeals stated that trial was necessary to determine whether facts existed supporting a receipt of fraudulent property by Sullivan (pp.

10a-11a, *infra*). In truth, however, as the record makes indisputably clear (see pre-trial order at (pp. 12a-13a, *infra*)), all parties recognized from the outset of litigation that there would not even be an allegation that Sullivan received fraudulently transferred property.

The United States Court of Appeals' treatment of the jurisdictional question represents either a flouting of established principles governing pendent jurisdiction or an extension of the concept of pendent jurisdiction as most recently defined in *Aldinger v. Howard*, 427 U.S. 1, 18 (1976). In a proceeding such as the one at hand, before a court can permit a plaintiff to pend a state law claim against a defendant to a bankruptcy claim against defendant (over whom there exists no independent basis for jurisdiction), the court must examine whether the Bankruptcy Act by negative implication precludes such claims. Second, if a court can satisfy itself that the Bankruptcy Act permits such claims, the court must then satisfy itself that Article III permits the exercise of jurisdiction. *Id.*

Given that the two analyses required by *Aldinger* were not undertaken, and given that recurring, far reaching and complex questions of law inhere in this appeal, justification exists for granting a writ of certiorari.

II. THE FIRST CIRCUIT DECISION VIOLATES THE REQUIREMENTS OF THE BANKRUPTCY ACT AND CODE.

The issue presented for the Court is whether in passing the Bankruptcy Act, Congress intended to preclude the pending of state law claims against non-recipients of fraudulently transferred property to Bankruptcy Act claims against recipients of fraudulently transferred property.

In passing the Bankruptcy Act, Congress specifically and by negative implication indicated that it did not want Bankruptcy

Act plaintiffs pending state law breach of fiduciary obligation claims against corporate directors to Bankruptcy Act claims against non-director recipients of transferred property.

The Bankruptcy Act "suggest[s] with some certainty that recovery may be had only against persons who have received the property in question." *Elliott v. Glushon*, 390 F.2d 514, 515 (9th Cir. 1967).

Title 11 of the United States Code, § 110(a)(4) gave the trustee his procedural rights to enforce section 67d and provided that if a transfer is made which is fraudulent under any applicable federal or state law, "the trustee shall reclaim and recover such property or collect its value from and avoid such transfer . . . against *whoever may hold or have received it* (Emphasis added.)" *Elliott v. Glushon*, *supra*, at 515.

The court in *Elliott v. Glushon*, *supra*, noted that the purpose of §§ 67d and 70 of the Act

is clearly to preserve the assets of the bankrupt; they are not intended to render civilly liable all persons who may have contributed in some way to the dissipation of those assets. The Act carefully speaks of conveyances of property as being "null and void," and authorizes suit by the trustee to "reclaim and recover such property or collect its value". The actions legislated against are not "prohibited"; those persons whose actions are rendered "null and void" are not made "liable"; and terms such as "damages" are not used. The legislative theory is cancellation, not the creation of liability for the consequences of a wrongful act. (Footnote omitted.)

Id. at 516.

In view of the limited remedy created by Congress in the Bankruptcy Act, it seems beyond dispute that Congress did not

wish to have the federal courts being used to entertain state law claims against co-defendants of defendants in Bankruptcy Act proceedings.

In view of the failure to comply with *Aldinger*, and in view of the significance of the questions involving Congressional intentions in the Bankruptcy Act, justifications exist to issue a writ of certiorari.

III. THE FIRST CIRCUIT DECISION CREATES CONFLICT IN THE CIRCUITS.

In the action at hand, the United States Court of Appeals for the First Circuit has effectively assumed that Article III of the United States Constitution permits the pending of defendant parties (over whom no independent jurisdictional basis exists) to federal question claims brought against co-defendants. The First Circuit result in this action accords with the approach adopted by the Tenth Circuit Court of Appeals in *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977). In *Transok*, the Tenth Circuit concluded that *Mine Workers v. Gibbs*, 383 U.S. 715 (1966), *Aldinger v. Howard*, *supra*, and several pre-*Aldinger* cases supported its holding that power exists to exercise pendent party jurisdiction. *Id.*

The approach to pendent party jurisdiction apparently endorsed by the First and Tenth Circuits stands diametrically opposed to the holding of the Ninth Circuit Court of Appeals. In *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), the Ninth Circuit Court expressly reaffirmed its earlier rejection of the doctrine of pendent party jurisdiction. *Id.* at 1198, 1200. In that case, the court held that the doctrine of pendent party jurisdiction stands beyond the constitutional parameters of Article III and cannot be used to add a defendant to a claim brought against the United States under the Federal Tort Claims Act. *Id.* at 1197-1200.

The conflict between the First Circuit and the Ninth Circuit justifies the issuance of a writ of certiorari.

IV. THE DECISION BELOW WILL UPSET THE DISTRIBUTION OF POWERS BETWEEN THE FEDERAL GOVERNMENT AND THE STATES.

Article III of the United States Constitution sets forth the parameters of the jurisdictional latitude allowed federal courts. Any extra-Article III exercise of jurisdiction by federal courts constitutes an invasion of the powers reserved to the states.

In the action at hand, by permitting the pending of defendant Sullivan to plaintiff's claims against defendants Consolidated Service Corporation, Recklitis and Otte, the Court of Appeals has effectively assumed answers to recurring, complex questions with far reaching constitutional implications. In numerous cases, the United States Supreme Court and courts below have avoided answering the questions whether Article III permits the pending of parties and claims in the circumstances here present. See *Aldinger v. Howard*, 427 U.S. 1, 14, 15 (1976); *Moor v. County of Alameda*, 411 U.S. 693, 712-715 (1973). In so doing, the Court has noted the tremendous significance of the questions involved. The action at hand presents an ideal opportunity for the Court to set forth answers to threshold questions present in the issue of whether Article III permits the pending of parties over whom there exists no independent jurisdictional basis. Guidance at this point from the Court would be especially appropriate in that federal courts appear to be involving themselves without authority in state law decisions. Avoiding the issue of whether parties can be pending, in itself, may be viewed as a derogation of the status afforded the fifty states in our constitutional scheme.

The action at hand also presents numerous examples of the necessity for being parsimonious in defining the outlines of

Article III. Relying on generalized fiduciary concepts established by the Massachusetts Supreme Judicial Court in 1933 and 1941, the district court below, upon cursory examination, concluded that the jury could properly find a breach of fiduciary duty by corporate director Sullivan. In so doing, the district court established a standard for Massachusetts corporate directors in an area beset with complex considerations about (a) the extent to which, if any, a corporate director must possess expertise in bankruptcy, and (b) the extent to which, if any, a corporate director must attempt to prevent key employees from joining competitor corporations.

In sum, in order to protect the delicate relationship between the United States and the fifty states, a writ of certiorari should issue.

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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